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No. 90-1829

Supreme Court, U.S.
FILED
JUN 27 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

701 PHARMACY CORP., WILLEN PHARMACY, INC., MAGNAM PHARMACY, INC., FAMILY PHARMACY, INC., 1491 DEKALB PHARMACY, INC., 96 CENT GOODS AND DRUGS, INC., LASID SALES, INC., ISHAM BROADWAY PHARMACY, INC., MRB PHARMACY, INC., SULTAN PHARMACY, INC., LAWRENCE DRUGS, INC., 67 EAST BURNSIDE PHARMACY, RITEWAY DRUGS, INC., ASIM DRUGS, INC., *Petitioners*,

—against—

CESAR PERALES, Commissioner of the New York State Department of Social Services, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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CESAR PERALES, Commissioner of the New York State Department of Social Services,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Respondent Cesar Perales, Commissioner of the New York State Department of Social Services ("the Department"), respectfully submits this brief in opposition to the petition for certiorari. The petition should be denied because it does not present a conflict among the courts of appeals and does not raise an important federal question which should be settled by this Court.

STATEMENT OF THE CASE

The court of appeals held in these consolidated appeals that New York's termination under 18 N.Y.C.R.R. § 504.7(a) of petitioners' participation in the Medicaid program did not deprive petitioners of a property interest, inasmuch as section 504.7(a), which became effective on January 5, 1987, permits termination without cause. *701 Pharmacy Corp. v. Perales*, 930 F.2d 163 (2d Cir. 1991) (1-a).[1] The court thus unanimously held, relying upon its opinion rendered the same day in *Kelly Kare Ltd. v. O'Rourke*, 930 F.2d 170 (2d Cir. 1991), that New York had not violated petitioners' rights under the Due Process Clause. (16-a). *See also Senape v. Constantino*, No. 90-7677 (2d Cir. June 18, 1991) (A-1a *et seq.*) (denial of re-enrollment under 18 N.Y.C.R.R. § 504.15(e)(14), which confers broad discretion upon the Department to deny reenrollment in Medicaid program based upon any factor affecting "the effective and efficient administration of the program", does not deprive provider of property interest).

The court further held that petitioners' rights under the equal protection clause had not been violated. The court rejected the argument that the State impermissibly differentiated between providers terminated without cause under 18 N.Y.C.R.R. § 504.7(a) and those terminated for "unacceptable practices" under 18 N.Y.C.R.R. Part 504.7(b). Providers in the former group are not afforded a hearing; those in the latter group receive a hearing. *Compare* 18 N.Y.C.R.R. §§ 504.7(a) and 519.4(b) *with* 18 N.Y.C.R.R. §§ 504.7(b), 515.6(b)(2)(vi), and 519.4(a).[2] The court upheld this disparity

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1 References to the Petition, the Appendix to the Petition, and the Appendix to this brief are cited as "___", "___-a", and "A-___a", respectively.

2 The court below accurately described the Department's regulatory scheme for enrolling and terminating providers (5-a to 7-a), except insofar as it stated that providers terminated under Part 504.7(b) are afforded a pre-deprivation hearing. (3-a). Nothing in the regulations requires that the opportunity for a hearing be afforded before the effective date of a section 504.7(b) termination. *See* 18 N.Y.C.R.R. Part 519.

based upon (1) the Department's unrebutted allegation that providers terminated for unacceptable practices under Part 504.7(b) have generally engaged in more serious wrongdoing than those terminated without cause under section 504.7(a) (13-a); and (2) the more serious consequences that befall a provider terminated under section 504.7(b).[3] (7-a to 16-a).

On June 10, 1991, after the court of appeals had denied petitioner's application for a stay of the mandate pending filing and disposition of a petition for certiorari, Justice Marshall denied petitioners' application for a stay pending disposition of the petition.

REASONS FOR DENYING THE WRIT

The first question presented in the petition is whether the Due Process Clause requires that providers excluded from a State's Medicaid program under a "without cause" standard are entitled to hearing. There can be no serious dispute with the proposition that under *Board of Regents v. Roth*, 408 U.S. 564 (1972) and its progeny, providers who can be so terminated lack a property interest in continued participation in the Medicaid program. In rejecting petitioners' due process claim, the court of appeals thus simply applied well-established principles. (16-a) (citing *Kelly Kare*, 930 F.2d at 174-76); *accord Senape*, *slip op.* at A-8a to A-10a.[4]

Petitioners claim that a property interest was implicated here because the Department based its termination upon

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3 For example, as the court of appeals recognized, providers who are terminated for "unacceptable practices" under Part 504.7(b) face censure and exclusion from the Medicaid program for a definite period of time. (9-a). Furthermore, notice of a Part 504.7(b) exclusion must be given to the federal government, which may exclude the provider from the Medicare program. (*Id.*) A provider terminated under Part 504.7(b) is also excluded from any involvement relating to the provision of care to medicaid recipients. (*Id.*) None of these sanctions applies to a § 504.7(a) termination, and a provider terminated thereunder may reapply for participation at any time. (10-a).

4 Unlike in *Kelly Kare*, 930 F.2d at 176, petitioners here do not rely upon New York Social Services Law § 364(2)(b) (McKinney 1983).

"charges" of serious violations affecting the public health (*e.g.*, 19, 41) and communicated those allegations to petitioners. (7-a). It is of course undeniable that the Department acted for reasons; it can hardly be assumed that the State acts mindlessly. *See Meachum v. Fano*, 427 U.S. 215, 228 (1976). But the issue is not whether the State's actions had a root in reason, or whether reasons were conveyed to petitioners, but whether the State, as a matter of law, can terminate a provider's contract only for cause or may do so without having to establish a basis. *Meachum*, 427 U.S. at 228. As the court of appeals recognized, the Department has broad discretionary authority to terminate participation in the Medicaid program without a finding of cause. (8-a). *Accord Senape*, *slip op.* at A-9a to A-10a; *Kelly Kare*, 930 F.2d at 177.

Contrary to petitioners' contention, there is no conflict in the courts of appeals as to the existence of a property interest in this context. Preliminarily, even assuming that a split within a circuit were a basis for a grant of certiorari, *but see Davis v. United States*, 417 U.S. 333, 340 (1974), there is no split within the Second Circuit. The Second Circuit stressed in *Kelly Kare*, 930 F.2d at 175, and *Plaza Health Laboratories, Inc. v. Perales*, 878 F.2d 577, 582 (2d Cir. 1989), that its statements in *Patchogue Nursing Home v. Bowen*, 797 F.2d 1137, 1144-45 (2d Cir. 1986), *cert. denied*, 479 U.S. 1030 (1987), and *Case v. Weinberger*, 523 F.2d 602 (2d Cir. 1975), concerning a nursing home's property interest in continued participation in the Medicaid program, were in the nature of dicta. Moreover, *Patchogue Nursing Home* and *Case* did not address a regulatory scheme providing for "without cause" termination. *Kelly Kare*, 930 F.2d at 175, 176 n.2; *Senape*, *slip op.* at 9a n.4.

Nor is there a real conflict among the circuits. The First and Tenth Circuits have held that where, as here, providers do not have a right to continued participation in a medical assistance program absent good cause, the termination of a provider does not implicate a property interest. *Koerpel v. Heckler*, 797 F.2d 858, 863-65 (10th Cir. 1986); *Cervoni v.*

Secretary of Health, Education and Welfare, 581 F.2d 1010, 1017-19 (1st Cir. 1978). No cases analyzing the issue have reached a different result. Petitioners' reliance on *Ram v. Heckler*, 792 F.2d 444, 447 (4th Cir. 1986) is mistaken since that case involved HHS' termination of a physician from the Medicare program, and like the Second Circuit's decisions in *Case* and *Patchogue*, addressed the issue only by way of a single sentence that is in the nature of dictum. Moreover, *Ram* relied solely on *Bowens v. North Carolina Dept. of Human Resources*, 710 F.2d 1015 (4th Cir. 1983), which based its recognition of a property interest upon a state regulation permitting termination of a provider only for cause. *Id.* at 1018. *Hathaway v. Mathews*, 546 F.2d 227 (7th Cir. 1976) simply relied upon *Case* and the appellant's apparent concession and in any event did not involve a regulatory scheme authorizing termination without cause. *Ritter v. Cohen*, 797 F.2d 119 (3d Cir. 1986) and *Cassim v. Bowen*, 824 F.2d 791, 796-97 (9th Cir. 1987) merely assumed the existence of a property interest, and *Ritter* did so based on an arguable construction of a state regulation permitting termination only for cause. *Id.* at 122. *See also Doe v. Bowen*, 682 F. Supp. 637, 642 (D. Mass 1987) (holding that HHS' termination of medicaid and medicare provider implicates a property interest because Secretary applies a good cause standard).

The second question raised in the petition, *i.e.*, whether the Department's action deprived petitioner of a liberty interest without due process, is not properly presented. None of the petitioners raised a liberty interest claim in their complaint or on appeal and therefore the court of appeals did not address the issue. Absent extraordinary circumstances not present here, an issue may not be raised for the first time in a petition for certiorari. *Delta Airlines v. August*, 450 U.S. 346, 362 (1981); Stern, Grossman & Shapiro, *Supreme Court Practice* at 364 (6th ed. 1986).

Moreover, *Koerpel v. Heckler*, 797 F.2d at 865-66, the primary court of appeals decision relied upon by petitioners

with respect to the liberty interest issue,[5] held only, consistent with *Bishop v. Wood*, 426 U.S. 341, 348 (1976), that when a provider alleges that stigmatizing reasons for his exclusion are to be published, he has raised a substantial due process claim. Here, however, the providers made no such allegation. (9-a to 10-a; *see Kelly Kare*, 930 F.2d at 177).

As to the equal protection issue which is the chief focus of the court of appeals' opinion, petitioners do not assert a conflict among the circuits and do not demonstrate why the court's opinion is open to question. As the court of appeals held, "[t]here is nothing anomalous about treating rule violations in a manner proportionate to the violation and providing enhanced procedural protections to those charged with more serious infractions" (11-a) and facing more serious consequences. *Id.* "[T]he Department's regulations satisfy the rational basis test inasmuch as they represent a measured response to the State's obligation to provide quality health care to the indigent and conserve public funds, while simultaneously affording enhanced procedural protection only to providers charged with fraud and abuse." (15-a to 16-a).

Petitioners argue that their right to equal protection was violated because the factors that underlay the Department's termination under section 504.7(a) could also have constituted unacceptable practices forming the basis for a section 504.7(b) termination. As the court of appeals recognized, however, the argument ignores (1) the Department's unrebutted explanation that a termination for unacceptable practices generally involves more egregious conduct than a section 504.7(a) exclusion and (2) the lack of any evidence demonstrating that some providers who were cited for the same conduct as petitioners have been terminated under section 504.7(b). (13-a). The court of appeals thus correctly ruled that there was "no basis to conclude that the regulations or

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5 Contrary to petitioners' assertion, the Seventh Circuit in *Sommerset House, Inc. v. Turnock*, 900 F.2d 1012, 1015 (7th Cir. 1990), did not address the question of whether the challenged governmental action affected a property or liberty interest.

the enforcement thereof operate in an irrational fashion." (*Id.*).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
June 27, 1991

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 804—August Term, 1990

(Argued: January 10, 1991 Decided: June 18, 1991)

Docket No. 90-7677

SAVERIO SENAPE, M.D.,

Plaintiff-Appellant,

—v.—

JOANN A. CONSTANTINO, Deputy Commissioner, Division of Medical Assistance, CESAR A. PERALES, individually and as Commissioner of the New York State Department of Social Services, and the DEPARTMENT OF SOCIAL SERVICES,

Defendants-Appellees.

Before:

WINTER and ALTIMARI, *Circuit Judges*, and WEXLER, *District Judge.**

* The Hon. Leonard D. Wexler, United States District Judge for the Eastern District of New York, sitting by designation.

Appeal from a judgment of the United States District Court for the Southern District of New York (Charles H. Tenney, *Judge*) dismissing a complaint alleging a deprivation of property and liberty interests without due process of law in connection with a decision by state officials not to reenroll a physician-provider in the New York State Medicaid program.

Affirmed.

ROBERT C. AGEE, White Plains, New York, *for Plaintiff-Appellant*.

CAROL SCHECHTER, Assistant Attorney General, New York, New York (Robert Abrams, Attorney General of the State of New York, Lawrence S. Kahn, Deputy Solicitor General, Robert J. Shack, Assistant Attorney General, New York, New York, of counsel), *for Defendants-Appellees*.

WINTER, *Circuit Judge*:

This appeal arises from the dismissal of a complaint brought under 42 U.S.C. § 1983 seeking (1) to enjoin appellees from denying appellant's application for reenrollment as a physician-provider in New York State's Medicaid program and (2) to recover damages for the deprivation of property and liberty interests without due process. The district court held that appellant has no property interest in his continued enrollment as a Medicaid provider and that, even if he has such an

interest, he was accorded due process. The district court also rejected appellant's deprivation of liberty claim on the ground that he failed to plead facts sufficient to establish the publication of stigmatizing information. For the reasons stated below, we affirm.

BACKGROUND

In 1979, Saverio Senape, M.D., was enrolled as a qualified medical provider in New York's Medicaid program, which provides medical services to indigent people. *See* 42 U.S.C. § 1396a *et seq.* (1988); N.Y. Social Services Law § 363 *et seq.* (McKinney Supp. 1991). The instant action arises out of a decision by state officials not to reenroll him.

1. *The Regulatory Scheme*

Under New York Soc. Serv. Law § 363a (1) and (2), the Department of Social Services ("DSS" or "Department"), which administers the Medicaid program, is authorized to make regulations governing the selection of medical services providers.[1] *See* N.Y. Comp. Code R. & Regs. ("NYCRR"), tit. 18 § 500 *et seq.* (1988). Two portions of these regulations—Parts 504 and 515—are pertinent to the instant appeal. We discuss each briefly.

Prior to 1987, a physician who had been accepted into the Medicaid program could be terminated only upon a finding of a failure to comply with DSS regulations, *i.e.*, for cause. However, in January of that year, DSS

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1 A "provider" is a person authorized to provide medical care, services or supplies to eligible recipients and to receive payment from Medicaid for the provision of such care, services and supplies. *See* N.Y. Comp. Code R. & Regs. ("NYCRR"), tit. 18, § 504.1(16) and (19).

issued a regulation under which all existing providers were required to apply for reenrollment. *See* 18 NYCRR § 504.10. Judge Tenney explained the effect of these new regulations as follows:

> Although DSS retains the authority to terminate a provider for cause, the new regulations in effect allow DSS, at its option, to invert the process. Instead of investigating each provider for deficiencies and terminating those found inadequate, DSS may require all providers to re-enroll en masse in the program and then choose whom it wishes to renew.

The standard governing reenrollment is the same as that applied to first-time applicants, "the best interest of the medical assistance program," 18 NYCRR § 504.4(e)(2), and, although many factors enumerated in the regulation focus on past or current conduct or competence, *id.* at § 504.5(a)(1)-(13), the regulation explicitly permits the Department to consider "any other factor which may affect the effective and efficient administration of the program, including, but not limited to, the current availability of medical care, services or supplies to recipients. . . ." *Id.* at § 504.5(a)(14). As the district court observed, the regulation affords DSS a mechanism by which a provider's participation may be terminated notwithstanding the applicant's apparent qualifications and lack of evidence of wrongdoing.[2]

By contrast, Part 515 sets forth the standards and procedures for sanctioning providers who engage in

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2 At the same time that the Department propounded its reenrollment regulation, it also codified the "at will" nature of providers' contractual participation in the program, *see* 18 NYCRR § 504.7(a), the provision at issue in *Kelly Kare, Ltd. v. O'Rourke*, 930 F.2d 170 (2d Cir. 1991), discussed *infra*.

"unacceptable practices" such as fraud or other specifically enumerated violations of DSS regulations. *See* 18 NYCRR § 515.2(a) and (b). A provider sanctioned under this provision is subject not only to termination of his reimbursement contract, *see Kelly Kare, Ltd. v. O'Rourke*, 930 F.2d 170 (2d Cir. 1991), but to exclusion from the program for a reasonable period of time, censure and the recovery of overpayments. 18 NYCRR § 515.3. Pursuant to federal regulations, moreover, notice of the provider's exclusion must be published. *See* 42 C.F.R. § 1002.206(c) (1990).

A disappointed applicant for enrollment or reenrollment under Part 504 is afforded less procedural due process than a provider facing sanctions under Part 515. A provider whose enrollment or reenrollment application is denied under Section 504.10, or whose participation in a reimbursement contract is discontinued under Section 504.7(a), is not entitled to a hearing. *Id.* at § 519.4(b). A provider charged with sanctionable practices, however, has the right to an evidentiary hearing. *See* 18 NYCRR § 515.8.

2. *The Instant Action*

In October 1987, appellant received a letter from DSS, sent according to a prearranged schedule involving all Medicaid providers, informing him that he would have to submit an application for reenrollment within sixty days. In November, shortly after appellant submitted the requisite forms, a DSS investigator visited appellant's office and requested copies of the medical records of ten patients. On March 8, 1988, DSS informed appellant that it had found various violations of DSS regulations in reviewing the patient records and had decided to

terminate appellant's participation in the program effective immediately. Initially, the Department based its termination decision on Part 515, which permits, *inter alia*, the immediate suspension of a provider upon a determination that the health or welfare of Medicaid recipients would be endangered by the provider's continued participation in the program. Appellant promptly contested this ruling and submitted various documents to DSS for further review. On March 15, before responding to the Part 515 appeal, DSS informed appellant that, based on its review of patient charts, it had decided pursuant to Part 504 not to reenroll him in the program. At that time, DSS also advised appellant that he could submit a written appeal of the Part 504 decision, which he did. On April 18, DSS informed appellant that it had reversed its earlier Part 515 termination decision but that the Part 504 reenrollment appeal was still under consideration. On July 29, DSS told appellant that it had denied his Part 504 appeal and that his participation in the program would cease effective August 12.

DISCUSSION

We assume for purposes of this appeal that DSS denied appellant's application for reenrollment under Part 504 because it was simpler than terminating appellant for cause under Part 515. By proceeding under Part 504, DSS avoided the need for an evidentiary hearing and availed itself of the discretion conferred by Section 504.5(a)(14). Appellant claims that this resort to Part 504 deprived him of a protected property right to continued enrollment in the Medicaid program and, additionally, of a liberty interest in his good name and professional reputation without due process. We dis-

agree. In light of the broad discretion afforded state officials charged with administering the Medicaid program, a provider has no reasonable claim of entitlement to continued enrollment in that program. Nor does appellant's complaint plead facts sufficient to establish publication of stigmatizing information, an essential element of his deprivation of liberty claim.

Our previous decisions have not resolved the question of whether a qualified provider of medical services under the New York Medicaid program has a property right in that status. In *Kelly Kare, Ltd. v. O'Rourke*, we held that a provider has no right to "uninterrupted participation in the program, i.e., a continuing reimbursement contract," but added that "there may be a property interest in a provider's status as a qualified health-care provider—a question we need not and do not reach." 930 F.2d at 176. We thus stated:

> There is a critical difference between being declared a qualified health-care provider and being awarded a contract to furnish health-care services. The refusal by a social services district to enter a contract with a qualified provider in no way affects the status of the provider. Such a disappointed provider remains free to seek a contract with a different social services district. . . .

Id. Unlike *Kelly Kare*, however, Dr. Senape is asserting a property right in his continued enrollment in the Medicaid program—*i.e.*, in his status as a qualified provider eligible to enter into reimbursement contracts with state and local entities. The instant appeal thus poses precisely the question left open in *Kelly Kare*.[3]

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3 Our decision in *701 Pharmacy Corp. v. Perales*, 930 F.2d 163 (2d Cir. 1990), decided the same day as *Kelly Kare*, is not dispositive. In

A property interest in the continued receipt of a governmental benefit must rest on "a legitimate claim of entitlement." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). Such an entitlement springs not from the Constitution itself but from " 'existing rules or understandings that stem from an independent source such as state law. . . .' " *Cleveland Board of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985) (quoting *Board of Regents v. Roth*, *supra*, at 577). As we stated in *Plaza Health Laboratories, Inc. v. Perales*, 878 F.2d 577 (2d Cir. 1989):

> Where the state provisions bestow a right that cannot properly be eliminated except for cause, that right constitutes property protected by procedural due process. On the other hand, the existence of provisions that retain for the state significant discretionary authority over the bestowal or continuation

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701 Pharmacy Corp., we rejected an equal protection challenge to the uneven due process afforded "for cause" and "without cause" contract terminations. Appellants argued that the arbitrary nature of New York's *termination* provisions (under which a qualified provider may be terminated without cause and without an opportunity to submit a written request for reconsideration, *see* NYCRR Section 504.7(a)) could be demonstrated by comparing them to the *enrollment* provisions (under which even a first-time applicant denied enrollment has the right to request reconsideration, *see* NYCRR Section 504.5(e)(1)). While acknowledging the irony of affording first-time applicants for enrollment greater procedural rights than existing providers, we nevertheless upheld the procedural asymmetry as rational on the ground that "[i]n one year, the Department makes approximately 100 times the number of enrollment decisions as it does decisions to terminate under § 504.7(a)" and that "[t]he written reconsideration procedure is thus aimed at minimizing the greater risk of error associated with an enrollment determination." *701 Pharmacy Corp.*, 930 F.2d at 169. However, *701 Pharmacy Corp.* turned on equal protection rather than property issues and thus did not address the question posed by the instant appeal.

> of a government benefit suggests that the recipients of such benefits have no entitlement to them.

Id. at 581 (citations omitted).[4]

Citing Part 504, we observed in *Plaza Health* that "the combination of rights reserved by the State with regard to Medicaid providers, allowing DSS to terminate [contractual participation] without cause on 30 days' notice or to terminate or suspend immediately in certain circumstances, casts doubt on whether the provider's interest in continuing as a provider, either indefinitely or for any period without interruption, is a property right that is protected by due process." 878 F.2d at 582. *Kelly Kare* and *701 Pharmacy Corp.*, 930 F.2d 163 (2d Cir. 1991), *see supra* note 3, have since highlighted the substantial discretion state officials have in determining the qualifications and status of New York Medicaid providers. To be sure, neither *Kelly Kare* nor *701 Pharmacy Corp.* determined whether a provider was entitled to continued enrollment in the program, but each emphasized that officials have broad discretion in selecting providers. *Kelly Kare* upheld the State's right to terminate without cause specific reimbursement contracts—the indispensable item that makes one's status as a qualified provider economically significant. *701 Pharmacy Corp.* upheld such discretion against an equal protection challenge. When combined with the obvious

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4 Decisions prior to *Plaza Health*—*see Oberlander v. Perales*, 740 F.2d 116, 120 (2d Cir. 1984) (no property interest in the future rate of reimbursements); *Patchogue Nursing Center v. Bowen*, 797 F.2d 1137, 1144-45 (2d Cir. 1986), *cert. denied*, 479 U.S. 1030 (1987) (nursing home had a property right in continued participation in Medicaid but received adequate due process); *Case v. Weinberger*, 523 F.2d 602, 609-10 (2d Cir. 1975) (same)—offer little guidance on the question raised in the instant matter because they predate the reenrollment scheme of Part 504.

discretion conferred by the reenrollment provisions themselves, these decisions convince us that our doubts in *Plaza Health* were well-founded and that appellant has no property right to continued enrollment as a qualified provider. There is nothing in the status of qualified providers to suggest that such status is more of an entitlement than one's status as a party to a reimbursement contract. The discretion of New York Medicaid officials is similarly broad with respect to both, and there is therefore no reason to regard one as a property right but not the other.

We also reject appellant's contention that the reenrollment regulation is inconsistent with the enabling statute, which states that the Department shall issue regulations "establishing and maintaining standards for all non-institutional health care and services rendered pursuant to this title, including *but not limited to* procedural standards relating to the revocation, suspension, limitation or annulment of qualification for participation as a provider" for incompetency, failure to meet program standards or threatening public health or safety. N.Y. Soc. Serv. Law § 364(2)(b) (McKinney 1983) (emphasis added). That DSS must issue regulations governing the "for cause" termination of providers in no way precludes the Department from issuing other regulations reasonably necessary to advance the objectives of the program. We therefore find no merit to appellant's claim that the reenrollment procedure conflicts with the statutory scheme.

We now turn to appellant's deprivation of liberty claim. An essential element of a claim for damage to professional reputation is the publication of false information. *See Quinn v. Syracuse Model Neighborhood*

Corp., 613 F.2d 438, 446-47 (2d Cir. 1980). Appellant's complaint alleges that false information contained in the Department's correspondence was distributed to "other government agencies, the medical community, third party insurers and other persons." However, because appellant cited no specific instance of distribution, the district court granted appellees' motion to dismiss under Fed. R. Civ. P. 12(b)(6), stating:

> Even giving Senape the benefit of the doubt that this ambiguous paragraph in his Complaint sufficiently alleges that DSS has already published this information, DSS has submitted a sworn affidavit denying that it has done so. *See* Tapp. Aff. ¶ 33. Therefore, Senape has failed to create a genuine issue of material fact as to whether defendants have deprived him of a protected liberty interest.

Appellant does not challenge the district court's resort to matters outside the pleadings. Nor does he claim that, if given notice of the court's intention to do so as required by Fed. R. Civ. P. 12(b)(6), he would have submitted evidence indicating publication. Although he might well be entitled to such a remand, *see Gutwein v. Roche Laboratories*, 739 F.2d 93 (2d Cir. 1984) (remand where insufficient time allowed to respond to summary judgment motion and party represents that contradictory evidence could have been obtained if ten-day notice period of Fed. R. Civ. P. 56(c) had been observed), his present failure to claim that he has evidence of publication indicates to us that a remand would be futile.

Affirmed.